

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Edmond Gasaway,)	No. CV-13-00906-TUC-RCC (CRP)
)	
Petitioner,)	
)	REPORT AND
vs.)	RECOMMENDATION
)	
Louis W. Winn, Jr., Warden,)	
)	
Respondent.)	
)	

Petitioner Edmond Gasaway,¹ proceeding pro se and confined in the Federal Correctional Institution-Tucson, has filed a Petition Under 28 U.S.C. § 2241 for a Writ of Habeas Corpus by a Person in Federal Custody. (Doc. 1, Pet.). Respondent has filed a Return and Answer to the Petition Under 28 U.S.C. § 2241 for a Writ of Habeas Corpus and Motion to Dismiss Petition. (Doc. 12, Answer). Petitioner has filed a Response and Answer to Respondent's Motion to Dismiss Petition. (Doc. 15, Reply).

Petitioner is presently serving a 387-month sentence as a result of his conviction on conspiracy and firearms offenses obtained in the Eastern District of Texas. (Answer at 2 & Doc. 12-2, Ex. A, Smithers' Decl., Attach. 1).² Petitioner was incarcerated at the Federal

¹ The docket sheet shows Petitioner's first name as "Edmond." Petitioner has signed his first name as "Edmon" on the Petition and other papers filed in this case.

² Respondent has provided the Declaration of Catherine Smithers, Legal Assistant, Federal Correctional Institution, Phoenix, Arizona (Doc. 12-2, Ex. A), who has verified as

1 Correctional Institution at Ray Brook, New York (“FCI Ray Brook”) from January 27, 2011,
2 to March 15, 2013. (Doc. 12-2, Attach. 3).

3 This case has been referred to the Magistrate Judge for a Report and
4 Recommendation. (Doc. 6, Order). For the reasons that follow, the Magistrate Judge
5 recommends that the Petition for Writ of Habeas Corpus should be denied.

6 **I. The Petition for Writ of Habeas Corpus**

7 Petitioner asserts in the Petition that on January 22, 2013, prison staff officers at FCI
8 Ray Brook entered his cell, removed Petitioner, and then searched his cell, claiming to have
9 found a razor inside an envelope with Petitioner’s name on it. (Pet. at 4). Petitioner contends
10 that the prison officers fabricated two Incident Reports, one claiming that Petitioner
11 threatened another with bodily harm, and the other claiming that Petitioner possessed a
12 weapon. (*Id.*). Petitioner contends that one of the officers retrieved a razor from his shirt
13 pocket, officers then photographed the razor blade, and the officers presented the “staged
14 photo” during the disciplinary proceedings. (*Id.*) Petitioner contends it is “highly
15 impossible” for an inmate in the special housing unit to obtain a shaving razor due to prison
16 procedures. (*Id.* at 4-5). Petitioner asserts as Ground One that he was falsely charged based
17 on fabricated evidence. (*Id.*).

18 Petitioner asserts as Ground Two that he was denied an impartial decision maker in
19 violation of his due process rights. (*Id.* at 5). In support of this ground, Petitioner contends
20 that the Discipline Hearing Officer (“DHO”) tried to persuade Petitioner to proceed without
21 his staff representative, told Petitioner he was going to find him guilty as charged, and told
22 Petitioner he could not file a police report or undergo a polygraph. (*Id.*). Petitioner asserts
23 that the DHO allegedly stated it did not matter if Petitioner had “Johnny Cochern [sic], he
24 was going to find him guilty as charged any way,” and this showed the DHO’s racial bias.
25 (*Id.* at 5-6). Petitioner contends that his loss of good time credits was the result of bias and
26

27 custodian of records true copies of certain records submitted as Attachments with
28 Respondent’s Answer.

1 he seeks to have the discipline incident expunged from his prison record and a return to his
2 status prior to being falsely accused. (*Id.*).

3 Respondent argues in the Answer that Petitioner was afforded all the due process to
4 which he was entitled and the disciplinary sanctions imposed against him were based on
5 “some evidence.” (Answer at 6). Respondent contends that the habeas petition should be
6 denied. Respondent does not challenge Petitioner’s claim that he exhausted his administrative
7 remedies regarding his allegations. (*Id.* at 2).

8 In his Reply, Petitioner reasserts the circumstances regarding his claims of fabricated
9 charges and bias. (Doc. 15 at 2-5). He contends, as he did in his Petition, that on the day of
10 the hearing, he witnessed the investigating and charging officers along with the DHO
11 gathered in an office discussing what action should be taken against him “cause they all were
12 tried [sic] of dealing with Gasaway.” (*Id.* at 5-6). Petitioner contends this was also reported
13 to him by a trustee. (*Id.* at 5). Petitioner asserts that he has been retaliated against because
14 he filed an “administrative remedy claim against Ray Brook for unconstitutional living
15 conditions,” referring to *Gasaway v. Perdue*, 9:11-cv-01272. (*Id.* at 9). Petitioner has
16 provided a copy of a “Complaint of Staff Misconduct” dated May 25, 2013 that appears to
17 have been submitted to the Bureau of Prisons (“BOP”) and which contains Petitioner’s
18 signature. (Doc. 15 at 20). Petitioner claims in this “complaint” that he was threatened by
19 a prison staff member regarding his filing grievances about the officers’ misconduct and
20 about living conditions at the Special Housing Unit. (*Id.*). He reasserts his claim that an
21 officer “orchestrated the placing of the razor blade” in his property. (*Id.*).

22 **II. Background**

23 **A. The Inmate Discipline Program**

24 The BOP inmate discipline program identifies certain acts that are prohibited at the
25 prison, classifies the severity of the prohibited acts as Low, Moderate, High and Greatest, and
26 identifies sanctions to be imposed when an inmate is found to have committed a prohibited
27 act. 28 C.F.R. §§ 541.1, 541.3 & Tables 1-2. The discipline process generally starts when
28 a staff member issues an Incident Report to an inmate based on the staff member’s

1 observation or reasonable belief that the inmate has committed a prohibited act. 28 C.F.R.
 2 § 541.5. The Incident Report describes the incident and prohibited act and generally is
 3 delivered to the inmate within 24 hours of the staff member becoming aware of the inmate's
 4 involvement in the incident. *Id.* Following the completion of a staff investigation, the Unit
 5 Discipline Committee ("UDC") reviews the Incident Report. 28 C.F.R. § 541.7. The inmate
 6 may appear before the UDC and may make a statement and present documentary evidence
 7 on his behalf. 28 C.F.R. § 541.7(d) & (e). The UDC may find that the inmate committed the
 8 prohibited act, it may find that the inmate did not commit the prohibited act, or it may refer
 9 the matter to the DHO depending on the seriousness of the prohibited act. 28 C.F.R. §
 10 541.7(a).

11 If the Incident Report is referred, the DHO conducts a hearing at which the inmate
 12 may appear at the DHO's discretion. 28 C.F.R. § 541.8(e)(1). After the hearing, the DHO
 13 may find that the inmate committed the prohibited act charged or a similar prohibited act
 14 based on the Incident Report, may find that the inmate did not commit the prohibited act, or
 15 may refer the incident for further investigation, review and disposition. 28 C.F.R. § 541.8(a).
 16 The DHO must be an impartial decision maker who was not involved in the alleged incident
 17 as a victim, witness or investigator or who otherwise was not significantly involved in the
 18 incident. 28 C.F.R. § 541.8(b). The DHO's findings must be based on "at least some facts
 19 and if there is conflicting evidence, on the greater weight of the evidence." 28 C.F.R. §
 20 541.8(f). The DHO provides the inmate with a written copy of the DHO's decision. The
 21 DHO's decision must include findings on the following issues: (1) whether the inmate was
 22 advised of his rights; (2) the evidence relied upon; (3) the DHO's decision; (4) the sanction
 23 imposed; and (5) the reason for the sanction. 28 C.F.R. § 541.8(h). The inmate may appeal
 24 the DHO's decision through the Administrative Remedy Program. 28 C.F.R. § 541.8(i).

25 **B. Background Facts**

26 On January 22, 2013, prison staff at FCI Ray Brook randomly searched Petitioner's
 27 property and allegedly found a razor blade inside an envelope with Petitioner's name and
 28 number on it. (Doc. 12-2, Attach. 4, Incident Report #2400121). On that same date, the

1 reporting prison staff member charged Petitioner in an Incident Report with a Code 104
2 prohibited act, possession of a weapon, and delivered the Incident Report to Petitioner. (*Id.*).

3 A Lieutenant at FCI Ray Brook assigned to investigate the incident advised Petitioner
4 of his right to remain silent and afforded Petitioner with an opportunity to make a statement.
5 (*Id.*, Attach. 4 at 2). Petitioner did not request any witnesses. (*Id.*). The Lieutenant
6 concluded based on the Incident Report that the report was justified and referred the matter
7 to the UDC for further disposition. (*Id.*).

8 Petitioner appeared before the UDC on January 25, 2013 and claimed he had been “set
9 up by the officer.” (*Id.*, Attach. 4 at 1). Based on the officer’s written report, the
10 investigation, and Petitioner’s statement, the UDC determined that the matter warranted
11 further hearing and referred the report to the DHO. (*Id.*).

12 On January 25, 2013, Petitioner was given Notice of a Hearing before the DHO.
13 (Doc. 12-2, Attach. 5, Notice of Discipline Hearing before the DHO). Petitioner requested
14 the presence of a staff representative and the testimony of two witnesses. (*Id.*). Petitioner was
15 provided with notice of his rights at the discipline hearing. (Doc. 12-2, Attach. 6, Inmate
16 Rights at Discipline Hearing).

17 Petitioner appeared before the DHO on February 12, 2013. (Doc. 12-2, Attach. 7,
18 DHO Report for Incident Report #2400121). Petitioner’s requested staff representative
19 appeared at the hearing. (*Id.* at 1). Petitioner denied the charges against him and stated he
20 never possessed a weapon. (*Id.*). Petitioner’s two witnesses appeared and testified that
21 Petitioner did not threaten anyone and they knew nothing about a weapon. (*Id.* at 2). The
22 DHO found that Petitioner had committed the charged Code 104 prohibited act, that is,
23 possession, manufacture or introduction of a weapon. (*Id.* at 2). The DHO stated as the basis
24 of the decision the reporting officer’s written statement that he had found the weapon in
25 Petitioner’s property and the photographs of the confiscated weapon. (*Id.*). The DHO
26 considered Petitioner’s statement denying that he possessed a weapon and the testimony of
27 the two witnesses but found that the greater weight of evidence consisted of the statement
28 of the reporting officer and the fact that the weapon was found in Petitioner’s property. (*Id.*).

1 The DHO sanctioned Petitioner by imposing 60 days of disciplinary segregation,
2 disallowance of 40 days of good conduct time, and 180 days of visiting, commissary,
3 telephone and email restrictions. (*Id.*). The DHO set forth his reasons for the action taken
4 and notified Petitioner of his appeal rights. (*Id.* at 3). A prison staff member delivered the
5 DHO report to Petitioner on February 19, 2013. (*Id.* at 3).

6 **III. Discussion**

7 Petitioner seeks the restoration of lost good time credits as a result of an alleged
8 improper prison disciplinary decision. (Pet. at 5-6; Doc. 15 at 11). Federal prisoners have
9 a right by statute to good time credits. *See* 18 U.S.C. § 3624. Habeas corpus jurisdiction is
10 available under § 2241 for a prisoner's claims that he has been denied good time credits
11 without due process of law. *See Bostic v. Carlson*, 884 F.2d 1267, 1269 (9th Cir. 1989).
12 "[A] claim challenging prison disciplinary proceedings is cognizable" under the federal
13 habeas statute "only if it will 'necessarily spell speedier release' from custody, meaning that
14 the relief sought will either terminate custody, accelerate the future date of release from
15 custody, or reduce the level of custody." *Nettles v. Grounds*, 788 F.3d 992, 995 (9th Cir.
16 2015) (citing, *inter alia*, *Skinner v. Switzer*, 562 U.S. 521 (2011)). The court has jurisdiction
17 over this habeas action.

18 To satisfy the basic requirements of due process in the context of prison discipline
19 proceedings, prison officials need only provide an inmate with: (1) a written notice of the
20 charge at least 24 hours prior to any hearing; (2) an opportunity to call witnesses and present
21 documentary evidence in his defense when such action will not be unduly hazardous to
22 institutional safety or correctional goals; and, (3) a written statement by the factfinders as to
23 the evidence relied on and the reasons for the disciplinary action. *Wolff v. McDonnell*, 418
24 U.S. 539, 565-66 (1974).

25 Due process further requires only that disciplinary findings be supported by "some
26 evidence" in the record. *Superintendent, Mass. Corr. Inst., Walpole v. Hill*, 472 U.S. 445,
27 454-55 (1985). This standard is met when "there is any evidence in the record that could
28 support the conclusion reached by the disciplinary board." *Id.*, at 455-56. While this is a

1 “minimally stringent” standard, “there must be some indicia of reliability of the information
2 that forms the basis for prison disciplinary actions.” *Cato v. Rushen*, 824 F.2d 703, 705 (9th
3 Cir. 1987). The “some evidence standard” does not require the court to examine the entire
4 disciplinary record, independently assess the credibility of witnesses, or reweigh the
5 evidence. *Hill*, 472 U.S. at 455.

6 Petitioner does not contend he did not receive the required notice or that he was not
7 provided with a written statement by the DHO regarding the evidence relied upon and the
8 reasons for the disciplinary action. (Doc. 15 at 4). Petitioner also does not contend that he
9 was denied a staff representative or the testimony of his two witnesses at the hearing. (*Id.*).
10 Petitioner makes clear in his Reply that he is contesting the fact that he was denied a hearing
11 by an impartial hearing officer, that the evidence relied upon consisted of a staged
12 photograph of a razor blade, and the DHO was not sufficiently impartial because he had
13 personal knowledge of the alleged false charges. (Doc. 15 at 4, 8-10).

14 Petitioner’s contention in Ground One is that it is “highly impossible” that an inmate
15 can possess a razor blade due to the prison procedures he describes in his Petition.
16 Petitioner’s allegation is not sufficient to refute the charge made by the reporting officer or
17 the determination by the DHO that Petitioner possessed the weapon. Even a fabricated or
18 false charge of misconduct does not amount to a per se due process violation. *See Freeman*
19 *v. Rideout*, 808 F.2d 949, 951 (2d Cir. 1986). The filing of a false disciplinary charge by a
20 correctional officer does not state a due process violation when the accused inmate is given
21 a subsequent hearing on the charge and afforded the procedural protections outlined in *Wolff*.
22 *Hanrahan v. Lane*, 747 F.2d 1137, 1140-41 (7th Cir. 1984).

23 The record shows that the DHO considered Petitioner’s statement and the testimony
24 of Petitioner’s two witnesses. The DHO gave greater weight to the reporting officer’s report,
25 the documentary evidence, including the photographs of the weapon, and that the weapon
26 was found in Petitioner’s property. The reporting officer’s testimony can constitute sufficient
27 evidence to support the disciplinary finding. *Bostic*, 884 F.2d at 1271. The “some evidence”
28 deferential standard of *Hill* applies to the findings of the prison disciplinary hearing officer

1 where the inmate has alleged that a prison guard has falsely accused him of violating a prison
2 rule. *Hines v. Gomez*, 108 F.3d 265, 269-70 (9th Cir. 1997) (in the context of a civil rights
3 claim). *See Bruce v. Ylst*, 351 F.3d 1283, 1289 (9th Cir. 2003) (“The “some evidence”
4 standard [of *Hill*] applies only to due process claims attacking the result of a disciplinary
5 board's proceeding, not the correctional officer's retaliatory accusation.”). Here, Petitioner
6 is making a due process challenge to the DHO’s disciplinary decision on the ground that
7 there was no evidence to support the decision. The DHO’s decision was supported by some
8 evidence and due process standards were satisfied.

9 Regarding Petitioner’s claim of bias by the DHO in Ground Two, Petitioner’s staff
10 representative appeared at the hearing before the DHO as did Petitioner’s two witnesses who
11 testified. There is no evidence in the record that shows that the DHO was involved in the
12 incident as a victim, witness, investigator, or otherwise. Petitioner’s contention that the DHO
13 knew the charge in the Incident Report was false is conclusory. Petitioner has not asserted
14 any connection between the DHO and Petitioner’s alleged claim about living conditions at
15 FCI-Ray Brook.

16 The DHO’s Report contains the report of Petitioner’s staff representative as stating,
17 “After hearing the decision of the DHO, Lt. Moore stated in his opinion the hearing was fair
18 and the inmate’s rights were upheld.” (Doc. 12-2, Attach. 7 at 1). The DHO provided the
19 basis for his decision and that finding was based on “some evidence.” The DHO’s finding
20 does not show that Petitioner was denied an impartial decision maker in violation of due
21 process. *See Liteky v. United States*, 510 U.S. 540, 555 (1994) (unfavorable or adverse
22 rulings alone are not sufficient to show bias unless they reflect extreme favoritism or
23 antagonism that the exercise of fair judgment was precluded).

24 **IV. Recommendation**

25 For the foregoing reasons, the Magistrate Judge recommends that the District Court
26 after its independent review deny the Petition Under 28 U.S.C. § 2241 For A Writ Of Habeas
27 Corpus By A Person In Federal Custody (Doc. 1).

28 Pursuant to 28 U.S.C. § 636(b), Rule 72(b) of the Federal Rules of Civil Procedure

1 and LRCiv 7.2(e) of the Rules of Practice of the U.S. District Court for the District of
2 Arizona, any party may serve and file written objections within **Fourteen (14) Days** after
3 being served with a copy of this Report and Recommendation. A party may respond to
4 another party's objections within **Fourteen (14) Days** after being served with a copy.
5 Fed.R.Civ.P. 72(b)(2). No replies to objections shall be filed unless leave is granted from
6 the District Court to do so. If objections are filed, the parties should use the following case
7 number: **CV-13-00906-TUC-RCC**.

8 Failure to file timely objections to any factual or legal determination of the Magistrate
9 Judge may be deemed a waiver of the party's right to de novo review of the issues. *See*
10 *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003).

11 DATED this 3rd day of June, 2016.

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15 **CHARLES R. PYLE**
16 **UNITED STATES MAGISTRATE JUDGE**
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